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No. 01-1176

Supreme Court U.S.
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IN THE

Supreme Court of the United States

ERIC CLARK, in His Capacity as
Secretary of State for the State of Mississsippi,
Petitioner,

v.

J. RANDOLPH LIPSCOMB, on behalf of himself
and all others similarly situated; MAYOR, CITY OF
COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS,
MISSISSIPPI; & THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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J. RANDOLPH LIPSCOMB, on behalf of himself and all others similarly situated; MAYOR, CITY OF COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS, MISSISSIPPI; & THE COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF

While the instant case was pending before the Fifth Circuit, Petitioner filed suit in the Chancery Court of Lowndes County with respect to four parcels of Sixteenth Section land not included in the class represented by Respondent Lipscomb.[1] Relief sought includes confirmation and removal of clouds on

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[1] Named defendants include the Mayor and City Council of Columbus and the Board of Trustees of the Columbus School District. The latter is charged with refusal to "fulfill its responsibility to administer the leasing " of Sixteenth Section land. Complaint, *Clark v. Mayor & City Council*, No. 2001-0757 (Ch. Ct. Lowndes County, Dec. 3, 2001).

the State's title. Prior to the filing for certiorari, defendants in those actions filed a petition to remove. In addition, Respondents filed a motion to have the district court enjoin the proceedings. In the interim between the filing of the Petition for Certiorari and the Respondents' Brief in Opposition, that court granted Petitioner's motion to remand[2] and denied the motion for injunctive relief.[3] There are, therefore, now parallel state court proceedings involving title to school trust lands in Columbus.

As made clear in the Petition, the Secretary of State's position on the merits is that a proper application of standing criteria and Eleventh Amendment immunity requires a holding that the district court was without jurisdiction. In the event these arguments are rejected, his position is that the case should have been dismissed under *Exxon v. Eagerton* because Section 95 is a "general regulatory measure" that may be applied in state-court litigation contesting the adequacy of consideration for leases of school lands free from restraints imposed by the Contracts Clause.

None of the arguments presented by Respondents in opposing the grant of certiorari present substantive reasons why this case does not meet Rule 10 criteria. Equally important, no credible arguments are presented as to why Respondent Lipscomb and his class, like all other holders of Sixteenth section leases in Mississippi, should not litigate their rights and responsibilities in the courts of Mississippi under criteria set forth in *Hill v. Thompson*.

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[2] *Clark v. Mayor & City Council*, No: 1:02CV1-D-D (N.D. Miss., March 4, 2002)

[3] *Lipscomb v. Columbus Mun. Sep. School Dist.*, No. 1:92CV20-D-D (N.D.Miss., March 4, 2002).

Standing: -- Other than correctly characterizing this litigation as the "functional equivalent" of a case seeking relief from a "common law cloud on title or slander of title,"[4] arguments put forth in support of standing have no substance. First, contentions that, if given another chance, Respondent Lipscomb "would have" proved that it "would have" been easier to obtain $100,000 for purposes of financing this litigation[5] are irrelevant. There is no decision of this Court holding that the standing requirement of Article III can be satisfied by fishing expeditions outside the record designed to postulate hypotheticals in support of the argument that a plaintiff is suffering actual or imminent injury. Rather, the presence or absence of constitutional injury is to be determined by allegations contained in the complaint and/or the summary judgment record of the district court.

Second, when standing is at issue, the determination of whether the "injury in fact" requirement is met in a class action is limited to consideration of facts and circumstances surrounding the named plaintiff at the time the complaint is filed and at the time the class is certified.[6] Respondents' contentions that two homeowners were unable to obtaining financing for sales of their houses[7] and that "some of" the property has been sold in the twelve-year period encompassed from the date of Respondent Lipscomb's initial filing in state court through the federal court proceedings are, therefore, irrelevant.

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[4] Brief in Opposition 6.

[5] *Id.* at 6-7.

[6] *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

[7] Brief in Opposition 7.

Arguments With Respect to Coeur D'Alene and the Eleventh Amendment: – As an initial matter, Respondents argue that the presence of the Department of Housing and Urban Development as a named defendant removes the "Eleventh Amendment barrier."[8] At all relevant times, however, the role of that agency has been one of a nominal party not actively participating in the summary judgment proceedings or the appeal to the Fifth Circuit.

Second, Respondents contend that since "the State itself"[9] is not a party before the Court, the Eleventh Amendment is inapplicable. This litigation, however, is premised on *Ex Parte Young* and names as defendant the state official (here the Secretary of State) charged with enforcing a state law alleged to be unconstitutional. Similar to *Coeur D'Alene*, it requires resolution of the issue of whether the Eleventh Amendment precludes the use of the *Ex Parte Young* fiction when – for all intents and purposes – federal litigation is the "functional equivalent" of a quiet title action. The presence or absence of the State as a party is, therefore, not a factor to be considered.

Equally so is the argument that since revenue does not flow to the state treasury there is no Eleventh Amendment violation.[10] Although under state law local authorities are statutorily granted the right to administer the property and retain revenue, ultimate responsibility for insuring that local entities comply with the constitutional mandate of Section 95

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[8] *Id.* at 8.

[9] *Id.* at 9.

[10] *Id.*

resides in the Office of the Secretary of State.[11] As recognized as early as 1898, "[u]pon the admission of Mississippi into the Union, the title and control of the school lands vested in the state, in trust for the inhabitants of the various townships."[12]

Finally, it is irrelevant that the myriad of conflicting circuit decisions applying *Coeur D'Alene* have nothing "to do with the rent price of public land."[13] What is important is that the facts of this case (which happen to involve leases of state land) present an appropriate vehicle to provide definitive guidance to the lower courts with respect to the continued vitality of *Ex Parte Young* when a state presents substantive arguments that sovereign interests warrant access to the Eleventh Amendment defense.[14]

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[11] *See, Papasan v. Allain*, 478 U.S. 265, 272 (1986)(explaining delegation to local authorities).

[12] *Street v. City of Columbus*, 23 So 773, 774 (Miss. 1898).

[13] Brief in Opposition 9.

[14] Pointing to an isolated segment of a motion to Supplement the Record before the lower court (incorporating material found in the record made before the district court), Respondents also suggest that Petitioner waived the Eleventh Amendment defense. *Id.* at 5.Waiver, of course, requires a "clear declaration" that the State intends to submit itself to Article III jurisdiction. *College Savings Bk v. Florida Prepaid Postsecondary Ed. Expense Bd.*,527 U.S. 666, 676 (1999). When briefing the merits before the court below, Petitioner made it clear there had been no express or implied waiver in the motion referred to by Respondents. In addition, it was also pointed out there was "no constitutional or statutory provision or court decision that "authorized a state agency or representative to waive the state's . . . immunity." (Reply Brief pp. 14-15). By reaching the merits of the Eleventh Amendment defense, the lower court obviously concluded that waiver was a non-issue.

Arguments With Respect to Exxon v. Eagerton and the Contracts Clause: – There can be no question that Section 95's general prohibition against the donation of lands "belonging to or under the control of the state . . . directly or indirectly, to private corporations or individuals," reflects an exercise of the state's broad power to "adopt general regulatory measures."[15] Once the police power is utilized in this manner, *Exxon v. Eagerton* holds that regardless of whether there are adverse effects on existing contracts between private parties or on those with the state itself, States need not be concerned with real or potential violations of the Contracts Clause.[16] Finally, the fact that neither the Petitioner or Respondents brought the *Eagerton* decision to the attention of the court below has nothing to do with the proper disposition of this case, *i.e.*, it is legal issues not raised in the courts below that are of jurisdictional concern, not the failure of counsel to cite all relevant decisions bearing on an issue properly raised.[17]

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[15] Contrary to Respondents' suggestion, Brief in Opposition 11, the provision has been construed to apply to all state lands, not just those held in trust for the state's schools. *See, e.g., Jackson County Historical Soc. v. Board of Supervisors*, 58 So.2d 379 (Miss. 1952) (site for abandoned courthouse); *United States v. Harrison County*, 399 F2d 485 (5th Cir. 1968)(public beach).

[16] 462 U.S. at 189-192.

[17] Once issues are properly raised, it is common practice for this Court to either bring relevant cases to the attention of council or refer to decisions not cited as precedent in reaching a final decision. *E.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 490 (1997)(bringing to the attention of government counsel a case "not cited" to support "limited rationale" of argument relating to commercial speech); *Romer v. Evans*, 517 U.S. 620, 634, 649 (1996)(analysis by majority opinion and dissent of binding weight that should be given to case not cited by either party).

CONCLUSION

This litigation was designed by Respondents' for one purpose and one purpose only: to use the federal courts as a shield against state-court litigation that places at issue the question whether terms of Sixteenth Section leases in Columbus are so outrageous as to "shock the conscience." In keeping with this objective, Respondents now adopt the position that if this case is litigated in the courts of Mississippi and the Secretary of State's position prevails, it "would destroy the leaseholders' $30 million in investment by charging increased rentals on the property."[18]

Not once, however, does the Brief in Opposition make reference to *Hill v. Thompson* or allude to the twelve years of litigation, negotiations and settlements throughout the State in which equitable criteria set forth in that decision[19] have been employed for the benefit of the state's public schools without inflicting serious economic harm. Thus, without any factual support and with total disdain for the most basic principles of federalism,[20] Respondents contend that Columbus lands are uniquely different and that the state judicial system in general and the Mississippi Supreme Court in particular, cannot be trusted to apply *Hill* in a manner that adequately protects present investments. Certiorari should be granted followed by

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[18] Brief in Opposition 3.

[19] Petition for Certiorari 5-6.

[20] And, equally so, for the interests of the children of Columbus. In yet another editorial dealing with the controversy engendered by the *Lipscomb* litigation, a leading Gulf Coast newspaper concluded that Respondents' refusal to accept responsibility for funds rightfully owed to the schools is "[l]ike stealing candy from a baby," with the only difference being that "[b]abies can live without candy." *Editorial*, The Sun Herald p. C2 (April 4, 2001).

a decision that places the issues and parties in the appropriate forum: the courts of Mississippi.

Respectfully submitted,

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